United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1242

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1242

UNITED STATES OF AMERICA,

Appellee,

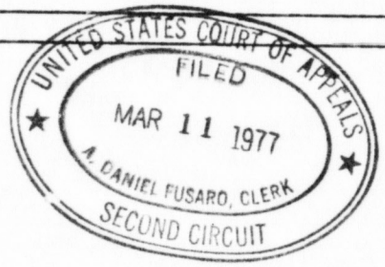
- against -

RAYMOND RICKMAN,

Appellant.

APPEAL ON A REMAND FROM THE SUPREME COURT

BRIEF FOR THE APPELLEE



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1242

UNITED STATES OF AMERICA,

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-against-

RAYMOND RICKMAN,

Appellant.

BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

This is an appeal on a remand dated June 28, 1976, from the Supreme Court for reconsideration in light of Doyle v. Ohio, ___U.S.___, 96 S.Ct. 2240 (1976). On November 24, 1976, this Court affirmed a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) entered on June 27, 1975, after a trial before a jury, convicting appellant Raymond Rickman and co-defendant Richard Smith of bank robbery in violation of 18 U.S.C. §2113(d). Appellant Rickman was sentenced to a term of fifteen years in prison, pursuant to 18 U.S.C. §4208(a).

The sole claim of error urged in the brief filed prior to the entry of the order of affirmance was whether, under United States v. Hale, 422 U.S. 171 (1975), which held that it was improper to impeach a defendant's trial testimony by his post-arrest silence, reversible error was committed by the alleged use that was made of appellant's selective silence at the time of his arrest.

The United States argued in response that (a) "appellant's claims have not been preserved for review," because no timely objection had been taken (Brief 8-10), (b) "if error was committed it was harmless error beyond a reasonable doubt" (Brief 10-15), and (c) that the "admission of the challenged evidence did not violate the privilege against self-incrimination" and that it "was relevant and otherwise admissible" (Br. 15-20).

After hearing oral argument, the judgment of conviction was affirmed in an "oral opinion delivered in open court in the belief that no jurisprudential purpose would be served by a written opinion" (535 F.2d 1224).[1/] The oral opinion, according to our recollection, which is subject to confirmation by listening to a recording of the proceedings, accepted the argument of the United States that the issue had not been timely raised below and that error, if any, was harmless.

1/ The appeal of the co-defendant, Richard Smith, was dismissed.

Subsequently, the appellant filed a petition for a writ of certiorari in which, after setting forth his argument on the merits, the appellant suggested that the only response made by the United States in this Court was that no error had been committed (Pet. 5-7). Although the Solicitor General did argue that the error, if any, was harmless, and that the issue had not been timely raised, it seems understandable that the Supreme Court was uncertain as to the ground upon which the judgment of conviction was affirmed.

Accordingly, it is not surprising that after deciding Doyle v. Ohio, supra, which reached the same result as United States v. Hale, supra, but on a somewhat different rationale, the Supreme Court vacated the judgment affirming appellant's conviction and remanded for reconsideration.

DISCUSSION

The appellant, first in a motion filed to alter the brief schedule, and by filing a full separate brief, has tried to suggest that somehow the issue on remand is different than what it was on the original appeal. The fact is, however, the original determination that the error, if any, was harmless, and had not been properly preserved, is as applicable now as it was before Doyle v. Ohio, supra, was decided.

We therefore rely on our original brief in arguing that the Court should adhere to its original judgment and affirm the conviction.[2/] We here supplement to those arguments with a brief reply to some of appellant's arguments which have been added in a vain effort to overcome the absence of a timely objection and the overwhelming evidence, which Judge Weinstein observed below, showed the appellant to be involved "up to his ears" in the bank robbery (290).

1. On pages 8-10 of our main brief, we show that at no time did the appellant's counsel object to the admissibility of appellant's selective silence while he gave what was essentially a false exculpatory post-arrest statement. The trial judge, however, sua sponte, instructed the jury, in substance, that in weighing the relevance of the evidence, they should bear in mind that appellant was not obligated to say anything.

The appellant now says that this instruction was inadequate to cure the error; but that argument should have been made to the trial court by an objection to the admissibility of the evidence. When no such objection was forthcoming after the first alleged improper reference to appellant's selective silence, it was entirely proper for the trial judge and the

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2/ We annex hereto a copy of our original brief.

Assistant United States Attorney, whose conduct Judge Weinstein praised (Tr. 544, 589), to assume that he was satisfied with the instruction as to relevance of the evidence. As Judge Lumbard observed in United States v. Rose, 525 F.2d 1026, 1027 (C.A. 2, 1975), in holding that a claim similar to that here had not been timely raised (525 F.2d at 1027):

> "Evidentiary objections must be raised at trial or they are foreclosed on appeal. See United States v. Indiviglio, 352 F.2d 276, 280-81 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907, 86 S.Ct. 887, 15 L.Ed. 2d 663 (1966). The court can be advised by the government of the relevant facts necessary to an informed judgment as to the admissibility of evidence only if questions as to admissibility are raised by the defendant promptly and no later than the time when the evidence is offered. As previously noted, appellant's counsel made no objection either before or after the prosecutor's cross-examination."

2. The appellant, in an effort to explain trial counsel's failure to timely object, now says (Br. 18):

> "Counsel's inaction was clearly the result of Judge Weinstein's sua sponte attempt to correct the error, and, at the time of trial, counsel could reasonably have believed that he was entitled to no more. The trial occurred in May 1975, before the Supreme Court had decided United States v. Hale, supra, 422 U.S. 171, or Doyle v. Ohio, supra, 96 S.Ct. 2240, and it is therefore reasonable that counsel might have understood that an instruction in accordance with Miranda was all that was required to cure the error. In this context, it would be unfair and too harsh to penalize Rickman for counsel's failure specifically to object to an error unknown to him at the time."

This claim is without substance. The trial occurred in May, 1975, only one month prior to the opinion in United States v. Hale; not only was Hale sub judice at the time, but the Supreme Court granted certiorari in Hale "because of a conflict among the Courts of Appeals over whether a defendant can be cross-examined about his silence during police interrogation" (422 U.S. at 173). One of the cases referred to as evidencing the conflict was this Court's opinion in United States v. Semensohn, 421 F.2d 1206, 1209 (C.A. 2, 1970), which had already decided that such cross-examination was improper. Accordingly Hale and Doyle did no more than affirm the result reached by this Court in Semensohn.

3. Although the appellant attributes the absence of a timely objection to the uncertain state of the law, he is quick to attack the Assistant United States Attorney who tried the case for his "inability to refrain from resorting to this evidence" (Br. 17). Appellant suggests that because, "[t]wice during the trial Judge Weinstein gave sua sponte cautionary instructions, and then, specifically told the prosecutor in a bench conference that the evidence of custodial refusal to respond would 'not come in'" (315), it was improper in summation to ask the jury to draw an "inference of guilt from

custodial silence" (Br. 18, n. 4).[3/] This claim is without substance.

Since the evidence was admitted, without objection, subject to a limiting instruction, it was not improper to refer to it in summation. Of course, that is why a timely objection is so critical. Moreover, on the first of the two instances in which the evidence was alluded to in summation, it was clearly not directed to inferring "guilt from custodial silence." The comment related to appellant's statement that he had been asleep when the robbery took place and his failure to respond when asked how he knew when the robbery took place. The defendant's counsel, in an effort to answer the question, argued to the jury that the bank robbery was well publicized (Tr. 435-436). It was in response to this that the Assistant United States Attorney argued, without objection, but subject to a limiting instruction, that (Tr. 515):

> "If Mr. Rickman had indeed heard it on the radio or a friend had indeed told him the time of the robbery, after hearing about it, wouldn't he say that to the FBI when he asked him the obvious question: How do you know you were asleep at the time, and we never told you the time?"

3/ The "bench conference" to which appellant alludes took place after the evidence at issue here was admitted and was called in a response to a claim that the witness was going to be asked questions which showed that appellant was "not being forthcoming" in his post-arrest interrogation (Tr. 314). Judge Weinstein ruled that he would not permit such evidence and the Assistant United States Attorney agreed (Tr. 314).

On only one occasion in his summation did the Assistant United States Attorney try to do more than attempt to use the selective silence to impeach the credbility of the exculpatory statement (Tr. 519). Judge Weinstein stopped him in his tracks and instructed the jury "[t]hat this is not a proper argument, don't make it ***. He didn't have to sign anything or say anything to the F.B.I." (Tr. 519).

There was no further argument along this line. Moreover, aside from this unfortuante slip, the conduct of the Assistant United States Attorney was exemplary. Indeed, Judge Weinstein repeatedly praised his conduct:

> "The Government had prepared this case, as far as I can tell very thoroughly. They have revealed everything they can." (221). ***
>
> "I must say, I think the Government attorney made every effort to prevent prejudice by not showing all those cartridges and bullets to the jury." (544). ***
>
> "I believe the summation of the prosecutor was calm, reasoned and perfectly appropriate to the circumstances." (589).

These comments by a judge, whose sensitivity to the rights of a defendant are well known, and were manifested by his sua sponte instructions here, constitute a complete response to the suggestion of deliberate prosecutorial miscorduct.

4. We, of course, recognize that the absence of a timely objection does not preclude the Court from noticing an error so manifest that it is necessary in order "to prevent a miscarriage of justice." United States v. Viale, 312 F.2d 595, 601 (C.A. 2, 1963); United States v. Semensohn, 421 F.2d 1206 (C.A. 2, 1970). But that standard has hardly been met here as we show in our main brief.

a. The underlying reason for excluding evidence of the kind at issue here, is that it is of limited relevance, because the defendant is under no obligation to speak and, since he has been told he need not speak, it is also unfair to use his silence even to impeach an otherwise exculpatory statement. Here, however, the cautionary instruction partially remedied the "prejudice" by telling the jury that the defendant was not obligated to do or say anything. And, indeed, the appellant's lawyer, who relied on the post-arrest statement as the cornerstone of the defense, explained appellant's selective silence in this manner.

b. Moreoever, as we demonstrated in our main brief, because the post-arrest statement was exculpatory, there was no reason to introduce it at all if the selective silence could not be used to impeach it; and defendant, who could not have introduced it, would have been deprived of the cornerstone of his defense (Br. 10-12). So that essentially, the defendant

had the advantage of using his exculpatory statements, without subjecting himself to cross-examination, and, on top of that, got the advantage of a cautionary instruction which undermined the impeachment value of his selective silence (Br. 11-12).

c. These considerations aside, as we demonstrated in our main brief, the evidence of the defendant's guilt, in Judge Weinstein's words, showed appellant to be involved "up to his ears" in the bank robbery (Tr. 290). The evidence included an eyewitness who had known the defendant, recognized him and voluntarily came forward. Moreover, the defendant, who, as a result, was arrested on the day after the robbery, had almost $800.00 in cash on his person, even though he was unemployed, and his fingerprints were found on the "Switch car." Moreover, the defendant did not put in any defense whatever. The case is thus distinguished from United States v. Semensohn, supra. There the defendant's total post-arrest silence had been used to impeach his credibility. In reversing the judgment of conviction, the Court observed (421 F.2d 1210):

> "In sum, inasmuch as an objection to the prosecutor's line of inquiry, albeit on the wrong ground, was promptly made, and the court's attention was focused upon the proper reason therefor prior to the close of the case; and, in view of the prejudice created by the unconstitutional inference inherent in the questions and their answers, the importance of the defendant's credibility to his defense, and the accumulation of errors affecting that credibility, we are convinced 'there is a reasonable possibility' that the latter error 'might have contributed to the conviction.'"

Here there was never a timely objection, there was a limiting instruction, there were no other prejudicial errors and the evidence of guilt was overwhelming.[4/]

CONCLUSION

The judgment of conviction should be affirmed.

March 10, 1977.

Respectfully submitted,

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Eastern District of New York

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

4/ The appellant suggests that the reversal of the convictions in United States v. Hale, 422 U.S. 171 (1975) and Doyle v. Ohio, ___U.S.___, 96 S.Ct. 2240 (1976), on evidence which was allegedly stronger than that here, requires reversal (Br. 20). But both Hale and Doyle are irrelevant on this issue. In United States v. Hale, as we pointed out in our main brief (Br. pp. 11-12, n. 11), the Solicitor General deliberately refrained from arguing the harmless error point solely because it was not of sufficient importance to warrant Supreme Court review. Similarly, in Doyle v. Ohio, the State did not make a harmless error argument (___U.S. ___, 96 S.Ct. at 2245). Indeed, as the Court of Appeals for the Fifth Circuit recently observed, the result in Doyle "might have been different had the state claimed that the impeachment use of silence was harmless error." United States v. Davis, 545 F.2d 583, 594 (C.A. 5, 1977).

75-1242

United States Court of Appeals
FOR THE NINTH CIRCUIT

75-1242

UNITED STATES OF AMERICA,
Appellee,

—*against*—

RAYMOND RICKMAN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

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TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1242

UNITED STATES OF AMERICA,

Appellee.

—against—

RAYMOND RICKMAN,

Appellant,

BRIEF FOR THE APPELLEE

Preliminary Statement

The appellant, Raymond Rickman, appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on June 27, 1975, after a jury trial convicting him and his co-defendant, Richard Smith, of armed bank robbery, in violation of Title 18, United States Code, Section 2113 (d).[1] The appellant was sentenced to fifteen years imprisonment pursuant to Title 18, United States Code, Section 4208(a)(2).[2] He is currently incarcerated under a state sentence.

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[1] On May 8, 1975, after the verdict was returned, Judge Weinstein remanded both defendants to custody, finding them to be a "threat, actual and implicit, to independent witnesses" (575). Numbers in parentheses refer refer to trial transcript pages.

[2] Richard Smith received an identical sentence. His lawyer has filed a brief, pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), which demonstrates that there are no non-frivolous issues to be raised on his behalf. The United States has filed a motion to dismiss his appeal.

On this appeal appellant Rickman contends that reversible error was committed when evidence was admitted, without objection, to show (1) that he refused to sign a voucher for money found on his person at the time of his arrest and (2) that he remained silent during a post-arrest interrogation when, after stating that he was asleep at the time of the robbery, he was asked how he knew what time the bank was robbed.

Statement of Facts

1. On December 23, 1974, the Chase Manhattan Bank branch at 190-02 Jamaica Avenue, Jamaica, New York was robbed of approximately sixteen thousand, nine hundred forty-two dollars ($16,942.00).[3] At about 10:30 that morning three black men, one armed with a sawed-off shotgun, entered the bank and announced, "This is a stickup. Everybody freeze. Hit the floor." Everyone in the bank dropped to the floor (55-57). The man who was then carrying the shotgun, later identified as co-defendant Smith (81-82), approached the bank guard, Joseph Leader, placed the shotgun against Leader's side, told him to "freeze", took away his .38 calibre service revolver and placed Leader up against a plate glass door located at the rear of the bank with his hands in the air and his legs outstretched (59). The man with the shotgun was six feet three inches tall, wearing a dark blue coat and white hat; a second robber was the same size (60). The third man was shorter than the other two (69). All three had sweaters covering their faces up to the nose, hats, and at least one wore dark glasses (57-58). Through the reflection of the glass door Leader was able to see

[3] The bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, was equipped with two surveillance cameras which were activated during the robbery. Fourteen (14) photographs taken by those cameras were introduced into evidence. (43, 45-47).

the man with the shotgun retrace his steps and position himself by the front door while the other two robbers vaulted tellers counters on either side of the bank (61-62). After a few minutes the man at the door shouted, "Let's go; let's go." The other two men re-vaulted the tellers counters and ran passed the front interior door of the bank into a vestibule and waited (62-64). The man with the shotgun called out, "Don't nobody move", and fired a shot. A customer who was lying on the floor near Leader was hit by the shot (64-65). The man with the shotgun then joined the other two in the vestibule.[4] All three left the bank (68) and went East on Jamaica Avenue toward 191st Street (117-118).

The escape from the bank was witnessed by a bus driver whose bus had stopped in front of the bank and by a passenger who, as it happened, recognized one of the members of the trio, as someone he knew. The passenger, Wayne Butler, a civilian employee of the New York City Police Department, testified he was on a bus returning home from Christmas shopping on the morning of December 23, 1974 (148). At about 10:40 A.M., as he was holding the rear door open to exit the bus, he heard a gun shot come from within the Chase Manhattan Bank, which was located directly in front of the bus stop (148-150). Butler saw a man "backing out" of the bank carrying a rifle; as he backed out he "looked around" to each side and placed the weapon "under his coat". As the man turned around Butler could clearly observe his face (150). He recognized that man as someone he had met about a year before the robbery, and who was intro-

[4] Apparently, while in the vestibule, appellant Smith gave the shotgun to appellant Rickman and took a pillowcase filled with money from Rickman, for, after the trio left the bank, Rickman was carrying the shotgun and Smith was carrying a pillowcase (150-153, 120-122).

duced to him as "Chink";[5] later that same day he selected a photograph of appellant Rickman and identified him as the man he knew as "Chink". Butler stated that as "Chink" ran down Jamaica Avenue, his hands were "tucked on the side of his coat", holding the weapon under his coat (154-155). He saw "Chink" enter a Ford automobile (151-152). That car, a white 1967 Ford, license plate number 919QQU, drove East on Jamaica Avenue and made a right turn onto 191st Street (124-128, 156). After the bus pulled away from the bus stop, Butler exited at the corner of 191st Street and called the police (156).

As the Ford turned onto 191st Street it was observed by Herbert Marin, a medical technologist, who was driving his sister-in-law to the train (175-178). The Ford passed Marin's car on the left, went through a stop sign, made a left turn and sped down Woodhull Avenue. Marin followed the Ford, saw it stop at 193rd Street and Woodhull Avenue, saw two black men exit and the car speed away (178-179). The shorter of the two men exiting the car carried a blue suitcase (181). The two men entered a tunnel under a railroad, which connected Woodhull Avenue and 99th Avenue (182). Marin drove his car to 99th Avenue, observed the men as they exited the tunnel, saw them enter a brown Oldsmobile and drive away (184-185).

At the same time, Anthony Webb, a fourteen year old seventh grade student, was returning home from shopping for his mother when he saw the two men get out of the Ford on Woodhull Avenue and enter the tunnel. The shorter of the two men carried a light blue suitcase (233-235). Webb followed them through the tunnel onto 99th Avenue, saw them go down the block and enter the brown Oldsmobile. Webb memorized the license plate number of

[5] When appellant Smith was arrested, he acknowledged that Rickman's nickname was "Chink" (272).

that car, 464YGY, wrote it on a piece of paper when he got home and gave the paper to his mother (238-242).

2. Bruce Brotman, a Special Agent of the Federal Bureau of Investigation, testified that on the same day, while conducting a neighborhood investigation of the robbery, he spoke to Anthony Webb and his mother, Mrs. Harriet Webb. Mrs. Webb gave him the slip of paper on which Anthony had written the words "464YGY D. Brown" (247-249). A motor vehicle registration check revealed that the owner of the auto with license number 464YGY was Mrs. Gaynell Smith, the mother of co-defendant Smith (249-250). After speaking to Mrs. Smith, Agent Brotman went to 127th Street in Queens, where he saw the 1972 brown Oldsmobile making a U-turn. The car was stopped by other agents on the scene and Richard Smith, the only person in the car, was removed from it. Agent Brotman opened the trunk of the vehicle and saw a "slammer" with an ignition switch attached to it (252-255). Such a device is used to remove dents from automobiles and is also used to steal cars. The latter is accomplished by placing the "slammer" against an automobile ignition switch so that the "slammer's" screw goes into the ignition key slot; the hammer at the other end of the "slammer" is then pulled back. This pulls the ignition switch from its housing, allowing the car to be started by placing a screw driver into the exposed housing and turning it like a key (270-271). The ignition switch found on the "slammer" in Smith's automobile, when scientifically tested and compared with the ignition housing from the white Ford, was found to have definitely been part of and broken off from the Ford's ignition housing (357-361, 363-366). Needless to say the Ford, used as the getaway car, was stolen the night before (333-335).

3. The appellant Rickman was also arrested on December 23, 1974, at 5:38 P.M., having been identified by Wayne Butler, the passenger on the bus, as one of the men exiting the bank and carrying a shotgun. Rickman was placed in an automobile, advised of his constitutional rights and brought to the 113th Precinct in Queens (300-303). He was then searched and some $762.24 was found on his person. Rickman, who was unemployed, told the arresting agent, Christopher Morrison, that he had won the money playing the "numbers" two days earlier, but could not recall the number, or any part of the number. Agent Morrison wrote a receipt for the money but Rickman refused to sign it (304-308). Rickman, after having been advised at the time of his arrest that he was being arrested for robbery of the Chase Manhattan Bank, 190-02 Jamaica Avenue, told Morrison at the 113th Precinct that he was asleep at the time of the robbery. Morrison, who was with Rickman continuously from the time of his arrest until he made that statement, testified that neither he nor anyone else told Rickman when the robbery occurred. Morrison said he asked Rickman how he knew he was asleep at the time of the robbery when they never told him when it occurred. Rickman made no response (309-310).

Subsequently, Smith's Oldsmobile, the "switch car", to which the three bandits transferred from the stolen Ford getaway car, was dusted for latent prints. One of those prints, on the left rear door, was positively identified as belonging to Rickman (329).

4. Neither Rickman nor Smith presented any defense at the trial.

ARGUMENT

The use of appellant Rickman's refusal to sign a receipt for the money found on his person and silence when his alibi was questioned does not require reversal.

The appellant's sole claim of error turns on the admission, without objection, of the testimony of the arresting F.B.I. agent regarding appellants conduct and statements to the agent after his arrest and after he was advised of his rights as prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The appellant, it will be recalled, explained to the agent that he could not have robbed the Chase Manhattan Bank branch at 190-02 Jamaica Avenue, because he was asleep when the robbery occurred. When asked how he knew when the robbery took place, appellant made no response. Moreover, after explaining that the $762.24 found on his person after his arrest (within hours of the robbery) was unconnected with the robbery, appellant refused to sign a receipt which acknowledged that this sum of money had been taken from him.[6] After each of these two occurrences were described, Judge Weinstein, *sua sponte*, instructed the jury that the appellant was not required to say anything, nor was he required to sign the receipt. Although no objection was taken when the testimony was admitted, although no motion was made to strike the testimony, and no motion was made for additional instructions from the Court, appellant contends here that a new trial is required because this testimony was admitted and because it was alluded to in summation (again without objection).

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[6] This procedure is essentially intended to protect the law enforcement officer against a subsequent claim that more money was taken from an arrestee than is vouchered by the officer.

We believe that this claim is without substance for a number of reasons. First, the absence of a timely objection below precludes the appellant from raising the issue here. Second, given the overwhelming evidence of appellant's guilt, including an eye-witness identification, appellant's fingerprints in the "switch car" and his possession of a large amount of cash within hours of the robbery, any error committed was harmless. Third and finally, it is our position that contrary to Judge Weinstein's instructions and appellant's claim, the Self-Incrimination Clause did not accord him any privilege to refuse to sign the receipt or respond to the follow-up question regarding his knowledge of the time the bank was robbed.

A. Appellant's claims have not been Preserved for Review

We have already taken note of appellant's failure to raise any objection when the disputed evidence was admitted or to move to strike the testimony. In an effort to overcome this obvious impediment to raising the issue at this point, appellant suggests that Judge Weinstein's *sua sponte* instruction to the jury, that appellant was not required to sign the receipt or to make any statement, "obviat[ed] the need for counsel to object" (Br. 12). According to appellant, the Judge attempted "to cure the error" by cautionary instruction (Br. 12). This suggestion misconstrues the thrust of Judge Weinstein's instructions. The admonitions to the jury, to which appellant alludes, did not bear on the admissibility of the evidence regarding appellant's refusal to sign the receipt or explain how he knew when the Chase Manhattan Bank was robbed. Instead, it dealt essentially with the weight to be accorded that evidence. What Judge Weinstein was in effect telling the jury was that in weighing the relevancy of appellant's conduct, they should bear in mind that he was not obligated to do or say anything (305). Judge Weinstein, however, did not instruct the jury that

the now disputed evidence was to be disregarded. And, if that is what appellant desired, he was required to say so at the time of trial.

Moreover, since the disputed evidence was admitted, subject only to a limiting instruction as to relevance, the Assistant United States Attorney was certainly not acting improperly in commenting on that evidence in his summation (again without objection). Appellant's suggestion that in so commenting, the Assistant United States Attorney "ignor[ed] Judge Weinstein's specific instructions * * * " (Br. 7), is without substance and is based on a previous misstatement in appellant's brief (Br. 6) that when the disputed evidence was admitted, Judge Weinstein "instruct[ed] the prosecutor that such inquiries were improper and * * * direct[ed] that the jury disregard that testimony (305)." All that Judge Weinstein said was that it was the appellant's "perfect right" not to sign the receipt; there is "no reason for him to sign anything" (305).[7]

Appellant's effort to avoid the preclusive effect of his failure to object must, therefore, fail; for there was no objection, no *sua sponte* order striking the testimony and no misconduct on the part of the Assistant United States Attorney.[8] Moreover, not even appellant is pre-

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[7] Only on the last occasion cited as error did Judge Weinstein suggest that the Assistant United States Attorney was commenting improperly on appellant's refusal to sign the receipt (519). There was no further comment by the Assistant.

[8] Judge Weinstein, in fact, repeatedly praised the manner in which the Assistant United States Attorney conducted himself:

> "The Government had prepared this case, as far as I can tell very thoroughly. They have revealed everything they can." (221). * * *
>
> "I must say, I think the Government attorney made every effort to prevent prejudice by not showing all those cartridges and bullets to the jury." (544). * * *
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> "I believe the summation of the prosecutor was calm, reasoned and perfectly appropriate to the circumstances." (589).

pared to argue that the admission of the disputed evidence, if error at all, was so manifest that it must be noticed—despite the absence of an objection—"to prevent a miscarriage of justice" *United States* v. *Viale*, 312 F.2d 595, 601 (2d Cir. 1963); *United States* v. *Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). See, also, *Egger* v. *United States*, 509 F.2d 745, 747 (9th Cir. 1975) holding that the failure to object waives any claim the Self-Incrimination Clause was violated in circumstances similar to that raised here. Rather than being "plain" error, the alleged error was harmless. And, indeed, we doubt that any error was committed at all.

B. If Error was Committed it was Harmless Beyond a Reasonable Doubt

1. While the appellant's argument has focused on the testimony regarding what he did not do or say during his post-arrest interrogation, it is important to consider at the outset that part and parcel of the disputed testimony was the submission to the jury of an exculpatory explanation by the appellant without taking the stand and without subjecting himself to cross-examination. In fact, it was his post-arrest statement which provided the only basis for any defense to the otherwise overwhelming case against him. And it may very well have been for this reason that no objection was taken to the testimony regarding his post-arrest statement.[9]

[9] There would have been no reason for the United States to have offered an otherwise trunkated version of appellant's post-arrest statements. Moreover, the appellant likewise could not have done so, since the exculpatory out of court statements he made were self-serving and not within any of the exceptions to the hearsay rule. F.R. Evid., Rules 801, 803. In these circumstances, the failure to object brings to mind the observation in *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975) that rather than indicating serious error it suggested "counsel's own difficulty in finding prejudice."

Thus, in his summation, appellant's counsel told the jury that appellant's possession of $762 in cash on the date of the bank robbery could be "accounted for the way Mr. Rickman accounted for it [after his arrest], that he won it playing the numbers" (426). Later on, after telling the jury that appellant was under no obligation to say anything at the time of his arrest, appellant's counsel again reminded the jury that appellant voluntarily spoke and provided a credible explanation (435-436).[10]

Moreover, aside from this obvious advantage of using the exculpatory material without taking the stand, the defendant had the benefit of Judge Weinstein's strong admonition going to the probative value of his refusal to sign the receipt or explain how he learned when the bank was robbed. Indeed, when the Assistant United States Attorney spoke to the issue in summation, Judge Weinstein explicitly told him in front of the jury "[t]hat this is not a proper argument, don't make it. * * * He didn't have to sign anything or say anything to the F.B.I." (519).[11] Of course, even without saying that the de-

[10] Appellant's counsel, for example, told the jury that the bank robbery was well publicized; he thereby provided an explanation for how appellant learned the time of the robbery.

[11] Appellant argues that the instruction cannot mitigate the error. He says in his brief p. 13:

> "However, as both the Supreme Court and the Solicitor General acknowledge in *United States* v. *Hale*, 43 U.S.L.W. 4806 (June 23, 1975), on facts less compelling than those in this case, mere cautionary instructions will not suffice to mitigate an error of this magnitude."

We, of course, do not suggest that a mere cautionary instruction, without more, would be sufficient to render any such error harmless. Compare, *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974), vacated for reconsideration in light of *United States* v. *Hale*, 95 S.Ct. 2133 (1975). We argue only that it is one factor to be considered in determining the likely prejudice. Moreover, appellant misreads the import of *Hale* and the position of the

[Footnote continued on following page]

fendant said nothing when asked how he knew when the bank was robbed, the Assistant United States Attorney would certainly have been free to ask rhetorically in his summation how the defendant knew he was asleep when the bank was robbed.

2. These considerations aside, the evidence of appellant's guilt was overwhelming. There was an eyewitness identification of appellant by a witness who knew him; appellant, unemployed for some time (311), was found in possession of an unusually large sum of money on the date of the robbery, and his fingerprints were found in one of the getaway cars. Moreover, appellant also fits the height description given by witnesses of one of the robbers, six foot three inches tall (60). The combination of this evidence, as Judge Weinstein observed, showed appellant to be involved "up to his ears" in the bank robbery (290).

No doubt one can posit hypothetical explanations for each of these incriminating facts, the identifying eyewitness and other witnesses could be mistaken, the money could have been won playing the numbers, the fingerprints could have been left in the car at another time. But it is hardly likely that any group of remotely sensible jurors would, in light of all the facts, accept such speculative arguments as a basis for acquittal. However, since the appellant has gone into some detail to suggest a basis in the record for his suggestion that there was a mistaken identification and that his fingerprints in the

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Solicitor General. There the Solicitor General sought a writ of certiorari to review the issue whether a defendant's total silence at the time of his arrest could be used to impeach the credibility of his exculpatory trial testimony. The Solicitor General failed to raise the issue of harmless error—not because of his belief that the error was not harmless, but because "the controversy on the point involves the application of an essentially undisputed standard

[Footnote continued on following page]

Oldsmobile "switch car" was left there at another time, we will respond in kind.

a. Appellant asserts that the eyewitness identification by an acquaintance of his, Wayne Butler, may have been mistaken because another eyewitness, one John Kugler, the driver of the bus on which Butler was a passenger, said that the robbers were still wearing masks and that Kugler saw three robbers escaping, while Butler saw two. But, in fact, Kugler testified that he could not be certain if all three men had their faces covered (144). Moreover, Butler testified that once he saw Rickman exit the bank with the shorter man, he kept his eyes on Rickman the entire time (159). The testimony is clear that the third man to exit (Smith) did so only after the first two were already running toward the car (119-120). Thus, it is not surprising that, concentrating on Rickman, Butler would not recall seeing a third man exit.

Moreover, contrary to appellant's claim, there is no real discrepancy between Butler and the bank guard as to who had the gun. What obviously happened was that Smith handed the shotgun to Rickman in the vestibule as they left the bank. Thus, John Kugler, the bus driver, when shown a surveillance photograph taken during the robbery, stated that the first man he observed exiting the bank—who was tall and had his hand clutched around his coat—was carrying a pillowcase (used to carry the money) inside the bank but not on the street (117-118, 120-122). This was the same man whom Butler identified as Rickman and whom Butler saw put the gun under his

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to the facts of a particular case" and was not of sufficient significance to warrant the consideration of the Supreme Court. (Brief for the United States, p. 6 n. 5 and p. 5, n. 4). And it was in this context that the Supreme Court in *United States* v. *Hale, supra*, 95 S.Ct. 2136 n. 3, observed that "the Government has not contended in this Court that the error was harmless."

coat as he exited the bank and hold his hands against his coat as he ran toward the car (154-155). Apparently, Rickman took the gun from or was given the gun by Smith in the vestibule and gave Smith the pillowcase. This is further corroborated by the bus driver's testimony that the third man out, wearing a dark blue coat and white cap (identified by the bank guard as Smith), carried a pillowcase, not a weapon (119-120).

b. Appellant argues, as he did at trial, that because Rickman's fingerprints were found in the "left rear" of the Oldsmobile and witnesses testified that the two men entered the *front* of that vehicle, Rickman's prints must have been placed there at another time. At trial, using the testimony and a map of the getaway route (Ex. 20), it was shown precisely how Rickman's prints got in the "left rear" of the Oldsmobile during the escape from the robbery. Marin testified that the Ford, after dropping off two of the men by the tunnel, sped down Woodhull Avenue (179); that the men who were dropped off went through the tunnel, down the street and entered the Oldsmobile at 193rd Street; the Oldsmobile then drove along 100th Avenue toward the higher numbered streets (185, 194). The Ford was found abandoned on the corner of 99th Avenue and 196th Street, facing 100th Avenue (Ex. 33). The jury was asked to draw the obvious inference that the remaining robbers in the Ford got out and ran along 196th Street to the corner (100th Avenue) and were picked up by the Oldsmobile as it sped up 100th Avenue. Since the testimony showed, as appellant stresses, that the men who were dropped off and entered the Oldsmobile got into the *front*, the only place for the other two to enter the Oldsmobile when it picked them up on 100th Avenue was the *rear*. It is logical that Smith would drive his own car, so he necessarily was one of the two dropped off initially. Since the other man dropped off was shorter, it could not have been Rickman. Thus, Rickman initially stayed in the Ford and entered the *rear* of the Oldsmobile when it picked him up on 100th Avenue and 196th Street.

In sum, there is no substantial basis in the record for any of the speculative explanations suggested by appellant. The evidence is thus in marked contrast to *Hale*, where the Court of Appeals, agreeing with the opinion of the trial judge, characterized the testimony against Hale as "confused and contradictory" and "weak". *United States* v. *Hale*, 498 F.2d 1038, 1044, 1045 (D.C. Cir. 1974). Here the evidence was "sufficiently overwhelming to have precluded by itself the possibility of his acquittal." *United States* v. *Williams*, F.2d , No. 75-1206 (2d Cir. September 26, 1975). See, also, *Egger* v. *United States*, 509 F.2d 745, 747 (9th Cir. 1975).

C. The Admission of the Challenged Evidence did not Violate the Privilege Against Self-Incrimination. The Evidence was Relevant and Otherwise Admissible

1. The foregoing discussion has assumed that the Self-Incrimination Clause of the Fifth Amendment permitted the defendant to decline to sign the receipt and to decline to respond to the question how he knew when the Chase Manhattan Bank was robbed after explaining that he was asleep when the robbery took place. Since it has been held that it violates the Self-Incrimination Clause to comment on a defendant's failure to testify at trial (*Griffin* v. *California*, 380 U.S. 609 (1965)), it follows—according to appellant—that he enjoyed similar protection from comment on his selective silence at the time of his post-arrest interrogation.

There is, however, a critical distinction here between cases such as *Griffin* v. *California*, *supra*, and *United States* v. *Hale*, *supra*, which involved the exercise of the Supreme Court's supervisory powers, and the instant case. Here the appellant, after having been advised that he need not speak, and having been apprised of the other warnings prescribed by *Miranda*, did not choose to remain silent.

He chose to speak and waive the privilege against self-incrimination. His decision not to remain silent has significant consequences under well-settled holdings of the Supreme Court.

First, it is settled law that where a person does waive the privilege and answer questions, he is not privileged to decline to answer subsequent questions where the question does not present "a reasonable danger of further crimination in light of all the circumstances" *Rogers* v. *United States*, 340 U.S. 367, 374 (1950). "As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination" (Id.).

Second, where a party to a proceeding, whether criminal or civil, chooses to waive the privilege and offer exculpatory testimony, he cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. *Brown* v. *United States*, 356 U.S. 148 (1957); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900).

Applying those principles here it is plain, first, that after having told the agents that he won the $762 playing "the numbers", signing a receipt acknowledging "that the money had been taken from him" (Br. 12), would not have posed a "real danger" of further crimination. Similarly, having told the agents that he was asleep at the time the Chase Manhattan Bank was robbed, it is difficult to see (assuming the truth of the explanation)[12] how he could have incriminated himself by telling the agents how he knew when the bank was robbed. Moreover, assuming that a truthful answer could have in-

[12] At trial appellant's counsel urged the jury to accept this explanation as true (434-437).

criminated him—by showing that his prior response was false—appellant was not privileged to make a false exculpatory statement to the agents, and then refuse to answer questions (free of comment on his silence) intended to test the veracity of his answer.

There is, to be sure, unexplicated dictum in *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966) that "[w]here-in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his rights to remain silent when interrogated". But, as the Supreme Court has subsequently stated with respect to other broad dicta in that case, the "discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling" (*Harris* v. *New York*, 401 U.S. 222, 224 (1971), where the issue is not the admissibility of any statements but the admissibility of appellants' silence after having voluntarily spoken. We submit that there is no valid reason to depart from the well established holdings of the Supreme Court and accord a defendant greater protection, in areas which already involve an extension of the language of the Self-Incrimination Clause, than he is entitled to where the privilege applies by its very terms.

In distinguishing *Rodgers* v. *United States*, *supra*, 340 U.S. 367, in *Miranda* v. *Arizona*, *supra*, 384 U.S. 476, n. 45, Chief Justice Warren observed:

> "Although this Court held in *Rogers* v. *United States*, 340 U.S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a

> possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements [sic]."

Of course, the holding in *Rodgers* v. *United States*, *supra*, did not expressly turn on any of the considerations which the Chief Justice found to be controlling in *Rodgers;* nor is the distinction between a "legislative or judicial fact-finding authority" and an investigation by an agency of the United States charged with investigation of serious violations of law, significant.[13] This Court has declined to adopt such a distinction with regard to 18 U.S.C. § 1001, which makes it an offense to make false statements within the jurisdiction of an agency of the United States. In so doing, it noted that the F.B.I.'s law enforcement role was entitled to protection from false statements calculated to provoke an investigation by that agency because such statements may "cause more 'perversion' of that agency's functions—and more harm to individuals" than other false statements covered by Section 1001. *United States* v. *Adler*, 380 F.2d 917, 922 (2d Cir. 1967). See also, *Bryson* v. *United States*, 396 U.S. 64, 70 (1969), citing *United States* v. *Adler* with approval, and noting the significant interest "in protecting the integrity of official inquiries".

Where the F.B.I. is conducting an official inquiry pursuant to its legislative mandate, and where an individual suspected of criminal activity waives the privilege against self-incrimination, and makes an exculpatory statement, there is a very significant policy interest to be served by follow up questions intended to test the credibility of that statement. Otherwise the agency may be forced to waste needless time and effort in continuing its investigation.

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[13] Needless to say there was an equally "strong dissent" in *Miranda* as there was in *Rodgers*.

ch investigations may pervert its function as much as at of a "legislative or judicial fact-finding authority."

In sum, we urge the Court to follow the holdings in odgers v. *United States*, *supra*, and *Brown* v. *United tates*, *supra*, rather than the dictum in *Miranda* v. rizona, *supra*, and hold that the Self-Incrimination lause does not entitle a defendant to make exculpatory tatements and then refuse when asked to explain them; or does it permit him to decline to answer questions which could not conceivably incriminate more than he has voluntarily incriminated himself.

2. *United States* v. *Hale*, *supra*, in which the Supreme Court held—in exercise of its supervisory powers— that it was impermissible to use a defendant's total silence at the time of his arrest to impeach his exculpatory testimony at trial, is plainly inapposite here. In holding that a defendant's total silence at the time of his arrest was of very limited probative value, the Supreme Court acknowledged that: "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation" (95 S. Ct. 2136). But, since "[f]ailure to contest an assertion * * * is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question", and since a defendant in-custody is advised of his right not to speak, "his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication" (95 S. Ct. 2137).

This consideration, and others to which the Supreme Court alluded in *United States* v. *Hale*, are not applicable to a defendant who has obviously decided to speak and provide an exculpatory statement. He has affirmatively decided to "offer an explanation." Surely he has no rea-

sonable basis for refusing to answer questions which are intended to test the veracity of his statement (or to refuse to reiterate the gist of prior statements). The only real basis for refusal is that a true answer will expose the falsity of the earlier response. Such silence is plainly relevant. See Rule 401, F. Rules of Evidence.

Moreover, it cannot be said generally, or in the context of this case, that the prejudicial impact of the defendant's silence outweighed its probative value—as was said in *Hale*. The probative value is not only greater here than in the total silence case, but here the defendant derived a substantial advantage from the admission of his entire statement. In context, he was able, as we have shown, to assert an alibi defense without taking the stand, and he also had the advantage of Judge Weinstein's limiting instruction. In these circumstances, there is no basis for excluding relevant and probative evidence.

CONCLUSION

The judgment of conviction should be affirmed.

November 14, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of March 19 77 she served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
the Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Rita Bloom

Sworn to before me this
10th day of March 19 77.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977